RECENT CASE NOTES

BANKS AND BANKING—SAFE DEPOSIT BOXES—BANK A BAILEE.—Defendant a country bank, advertised safe deposit boxes for rent. The plaintiff rented a box, depositing securities therein. According to its custom the bank gave plaintiff one key and retained the master key itself, both keys being necessary to open the box. The plaintiff's box was burglarized. The lower court held that the bank was a bailee for hire and had exercised such care as was customary with country banks in like circumstances, giving judgment for the defendant. *Held*, that the judgment be affirmed. *Young v. First National Bank of Oneida* (1924, Tenn.) 265 S. W. 681.

Many courts declare that a safe deposit company is a bailee for hire. *Mayer v. Brensinger* (1899) 180 Ill. 110, 54 N. E. 159; *Cussen v. So. California Bank* (1901) 133 Calif. 534, 65 Pac. 1099; see *Roberts v. Stuyvesant Safe Deposit Co.* (1890) 123 N. Y. 57, 61, 25 N. E. 294, 295; Cummins, *Review of Law of Safe Deposit Companies* (1895) 9 HARV. L. REV. 131; Magee, *Treatise on Law of National and State Banks* (2d ed. 1913) 459. Thus it is generally held to have such possession of the contents as to be subject to garnishment in an action against the depositor. *Trowbridge v. Spinning* (1900) 23 Wash. 48, 62 Pac. 125; *Washington Loan and Trust Co. v. Susquehanna Coal Co.* (1905) 26 App. D. C. 149; *West Cache Sugar Co. v. Hendrickson* (1920) 56 Utah, 327, 190 Pac. 946; *cf. United States v. Graff* (1875, N. Y.) 67 Barb. 304; *Tillinghast v. Johnson* (1912) 34 R. I. 136, 82 Atl. 788; Paton, *Digest of Legal Opinions* (1921) 78; *contra: Gregg v. Hilson* (1870, Pa.) 8 Phila. 91; Cummins, *op. cit.* at p. 137. So the bank has been held a bailee, subject to the provisions of the Inheritance Tax Law. *National Safe Deposit Co. v. Stead* (1911) 250 Ill. 584, 95 N. E. 973. Statutes frequently provide a warehouseman's lien for such companies over the contents of unpaid-for boxes. Mo. Rev. Sts. 1909, sec. 1128; N. Y. Cons. Laws, 1923, ch. 3, sec. 331 (providing for the sale of contents after a certain period). Where the box contents are lost or stolen, courts generally attach a bailee's responsibility to the safe deposit company. *Safe Deposit Co. of Pittsburgh v. Pollock* (1877) 85 Pa. 391; *Koczora v. Standard Safe Deposit Co.* (1921) 221 Ill. App. 43; *Webber v. Bank of California* (1924, Calif.) 225 Pac. 41. Most text writers recognize that some of the factual elements of a normal bailment are lacking and deny that the relation is a bailment, the bank not having possession of the box contents which are generally unknown to it, and the depositor alone having access to the box. Hale, *Bailments and Carriers* (1896) 249; Van Zile, *Bailments and Carriers* (2d ed. 1908) sec. 195; Dobie, *Handbook on the Law of Bailments and Carriers* (1914) 167; 2 Street, *Foundations of Legal Liability* (1906) 291. Some of the adherents of this view consider the relation as that of landlord and tenant. See *People v. Mercantile Safe Deposit Co.* (1913, 1st Dept.) 159 App. Div. 98, 101, 143 N. Y. Supp. 849, 851; Van Zile, *op. cit.* sec. 196; NOTES and COMMENT (1925) 10 CORN. L. QUART. 255. But the few favoring cases lend scanty support to such a view. The depositor has been declared to have possession of the box contents. See *Mercantile Safe Deposit Co. v. Huntington* (1895) 89 Hun, 465, 469, 35 N. Y. Supp. 390, 392. And the bank has been held not to have possession or control of the box contents within the provisions of a statute regulating the disposition of the assets of a decedent. *People v. Mercantile Safe Deposit Co. supra* (bank kept no key). Where one of two joint lessees of a safe deposit box acquired a renewal to himself exclusively, he was compelled to hold it as if a co-tenant for the benefit of the other lessee. *Hackett v. Patterson* (1891, C. P.) 16 N. Y. Supp. 170. "Bailment" is a mere label of convenience attached to analogous situations in which the courts recognize certain uniform legal relations. The

lease of a safe deposit box may actually embody factual elements not present in other situations which the courts have called bailments. But where the relation is sufficiently similar to give rise to the same legal relations, overemphasis of the technical inaccuracy of terminology seems hardly justifiable.

CHATTEL MORTGAGES—FICTITIOUS NAME IN PURCHASE MONEY MORTGAGE CONSTRUCTIVE NOTICE TO SUBSEQUENT MORTGAGEE.—The purchaser of a pair of mules executed a chattel mortgage under a fictitious name to secure the purchase price. The mortgage was recorded. Subsequently he executed a mortgage to the plaintiff in his recognized name on the same mules to secure a loan. The plaintiff had no actual knowledge of the prior mortgage. In an action to foreclose the subsequent mortgage, the prior mortgagee was joined as defendant. The lower court held that the prior mortgagee prevailed. *Held,* that the judgment be affirmed. *Farmer's State Bank v. No. Oklahoma State Bank* (1924, Okla.) 232 Pac. 916.

Some courts require a literal compliance with the recording statutes to make a chattel mortgage constructive notice to third parties. *Kennedy v. Shaw* (1872) 38 Ind. 474 (filing after lapse of statutory period); *People v. Burns* (1910) 161 Mich. 169, 125 N. W. 740 (notary's jurat not signed); *Bell v. Sage* (1922) 60 Calif. App. 149, 212 Pac. 404 (lack of acknowledgment by mortgagor); *East Texas Motor Co. v. Baughman* (1923, Tex. Civ. App.) 248 S. W. 802 (improper attestation of witnesses). It is better for the court to determine whether or not the recordation was notice to the second mortgagee. *Cf. Gillespie v. Brown* (1884) 16 Neb. 457, 20 N. W. 632 (mortgage provided for five days' notice after default instead of statutory fifteen days); *Davis v. Caldwell* (1917) 37 N. D. 1, 163 N. W. 275 (name of witness placed in body of mortgage); *First Nat. Bank v. Cargill Elevator Co.* (1923) 155 Minn. 30, 192 N. W. 111 (omission of date commission of notary expired). But everywhere recordation in the wrong county is not constructive notice. *Payne v. King* (1910) 141 Mo. App. 246, 124 S. W. 1066; *Peaks v. Smith* (1908) 104 Me. 315, 71 Atl. 884; *McLarty v. Ashmore* (1922) 128 Miss. 735, 91 So. 421. Similarly, where the mortgagor's name is fictitious. *Mackey v. Cole* (1891) 79 Wis. 427, 48 N. W. 520; *Fish Furniture Co. v. Reliable Storage Co.* (1914) 187 Ill. App. 6 (purchase money mortgage); see *Ingram v. Watson* (1924, Ala.) 100 So. 557, 560; *contra: Alexander v. Graves* (1889) 25 Neb. 453, 41 N. W. 290. Or even where there was a mistake in an initial in the name of the mortgagor. *First Nat. Bank v. Haconda Mercantile Co.* (1910) 169 Ala. 476, 53 So. 802; *McReynolds v. First National Bank* (1922) 156 Ark. 291, 245 S. W. 819; *contra: First National Bank v. Farmer's Bank* (1922) 207 Ala. 402, 92 So. 639. The court in the instant case relied on a statement in Jones, *Chattel Mortgages* (1908, 5th ed.) sec. 247a, distinguishing purchase money from other mortgages. The same statement has led at least one other court into the same curious distinction. *Windle v. Citizens Nat. Bank* (1919) 204 Mo. App. 606, 216 S. W. 1020. The distinction seems inconsistent with the general rule that the vendee of goods under a fictitious name has the power to confer good title on an innnocent purchaser for value. Williston, *Sales* (2d ed. 1924) sec. 635. Nor is it in accord with the policy of our recording statutes which is to protect purchasers without notice. It seems also unsound from the standpoint of prevailing commercial notions to make such an arbitrary distinction.

CONTEMPT—SUBPOENAING UNNECESSARY WITNESSES.—The petitioner, charged with commission of certain felonies, subpoenaed one hundred and sixty-seven witnesses. Many of these he claimed were character witnesses, although evidence showed that some of these had no material or relevant testimony. He could give no reason whatsoever for having subpoenaed others. The lower court held this to be contempt. *Held,* that the judgment be reversed. *Ex parte Stroud* (1925, Ark.) 268 S. W. 13.

Courts have power in general to punish as contempt any act directly tending to "obstruct the course of justice." Beale, *Contempt of Court* (1908) 21 HARV. L. REV. 161. Such a power is essential to expedite process and preserve order in judicial proceedings. *In re Ulmer* (1913, C. C. E. D. Ohio) 208 Fed. 461; *McDougal v. Sheridan* (1913) 23 Idaho, 191, 128 Pac. 954. But the modern tendency is to ameliorate summary process and restrict the extension of the doctrine of contempt. Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior Federal Courts"* (1924) 37 HARV. L. REV. 1010; *Junius Hart Piano House v. Ingman* (1907) 119 La. 1017, 44 So. 850. Even though at times the danger of harshness on the part of a judge is a lesser evil than suppression of the judicial function by unrestrained disorder. Beale, *loc. cit.* But the court may limit the number of witnesses. 4 Wigmore, *Evidence* (2d ed. 1923) sec. 1908; *Samuels v. United States* (1916, C. C. A. 8th) 232 Fed. 536; *White v. Boston* (1904) 186 Mass. 65, 71 N. E. 75 (expert witnesses); *Hague v. United States* (1921, C. C. A. 9th) 276 Fed. 111; *Kendrix v. State* (1919) 138 Ark. 594, 212 S. W. 84 (character witnesses). In the instant case, therefore, there was actually no danger of "obstructing the course of justice."

CORPORATIONS—AGENCY—RESPONSIBILITY OF MASTER FOR AGENT'S SLANDER.—The assistant manager of the defendant corporation's hotel, having authority to investigate improper conduct in hotel rooms, ejected the plaintiff Martin, a barber, and the plaintiff O'Brien, a manicurist, from a guest's room to which they had been summoned, and while so doing applied slanderous epithets to them. Judgments in separate actions in slander were entered on the verdicts for the plaintiffs. *Held*, that the judgments be reversed and the complaints dismissed. *O'Brien v. B. L. M. Bates Corporation, Martin v. Same* (1925, App. Div. 1st Dept.) 208 N. Y. Supp. 110.

Some courts, while recognizing the master's responsibility for the slander of his agent, have refused to impose vicarious responsibility to the same extremes in slander as in assault. In these courts an unauthorized assault is often considered within the scope of employment. *St. Peter v. Telephone Co.* (1911) 151 Iowa, 294, 131 N. W. 2 (assault by a telephone operator upon a customer); *Seymour v. Greenwood* (1861, Exch.) 7 H. & N. 354 (unwonted violence in expelling an omnibus passenger); *Geralty v. Stern* (1883, N. Y.) 30 Hun, 426 (assault on a store customer mistakenly thought a rival company's spy). But under apparently similar circumstances a slander is outside the scope. *Vowles v. Yokish* (1920) 191 Iowa, 368, 179 N. W. 117 (slander by insurance adjuster settling a claim); *Glasgow Corporation v. Lorimer* [1911, H. L.] A. C. 209 (accusation of forgery while officially investigating an account). Other courts have refused to make this differentiation. *Roemer v. Jacob Schmidt Brewing Co.* (1916) 132 Minn. 399, 157 N. W. 640 (accountant's accusation of thievery to ex-employe demanding back pay); *Citizens Gas & Electric Co. v. Black* (1916) 95 Ohio St. 42, 115 N. E. 495 (meter inspector's accusation of theft of gas); see *Palmeri v. Manhattan Ry.* (1892) 133 N. Y. 261, 30 N. E. 1001. The decision in the instant case illustrates a present-day tendency, made possible by the flexibility of the test "scope of employment," toward restriction in this phase of the doctrine of *respondeat superior*. Admitting that an obvious pecuniary loss is less likely to result from slander than from physical injury, query whether economic policy should not favor a distributed loss, and the burden be placed on the corporation.

ELECTIONS—DEATH OF CANDIDATE RECEIVING HIGHEST VOTE—EFFECT OF NOTICE TO ELECTORS.—Ward, Canty and the petitioner were candidates for public office for which two were to be chosen. The morning before election, Canty died, which fact was given wide publicity in the newspapers and was imparted to the voters individually at the polls by the petitioner's supporters. In spite of this knowledge,

the balloting resulted in 5317 votes for Ward, 2942 for Canty and 1165 for the petitioner. The defendant, Board of Election Commissioners, refused to certify the petitioner's election. The petitioner asks for a writ of mandamus to compel the defendants to certify his election. *Held,* that the writ issue. *Madden v. Board of Election Com'rs of City of Boston* (1925, Mass.) 146 N. E. 280.

Qualified electors who fail to vote are bound by the controlling number of those who do. *Southington v. Southington Water Co.* (1908) 80 Conn. 646, 69 Atl. 1023; 13 Ann. Cas. 420, note. Blank, unintelligible or illegal ballots are disregarded in determining the results so that a majority of the residue will carry the proposition. *Hopkins v. City of Duluth* (1900) 81 Minn. 189, 83 N. W. 536; *contra: Lawrence v. Ingersoll* (1889) 88 Tenn. 52, 12 S. W. 422. But votes cast for a candidate in ignorance of his ineligibility, legal or factual, though not electing him, are effective to prevent the election of the next highest candidate and to necessitate a new election. *The King v. Bridge* (1813, K. B.) 1 M. & S. 76; *Heald v. Payson* (1913) 110 Me. 204, 85 Atl. 576. If, however, the facts making the candidate ineligible are known, the English rule is that the votes are to be regarded as nullities on the theory that one is "presumed to know the law." *Beresford-Hope v. Lady Sandhurst* (1889) L. R. 23 Q. B. Div. 79; *Gulick v. New* (1860) 14 Ind. 93. In the United States, a knowledge of the facts and of the rule of law making the candidate ineligible is required to show an intention wilfully to throw away one's vote. *People v. Clute* (1872) 50 N. Y. 451. So, where the death of a candidate is known, it has been held that the voters intended to throw away their votes. *State v. Frear* (1910) 144 Wis. 79, 128 N. W. 1068. A possibility that the candidate may be declared eligible is sufficient to show "good faith" so as not to elect the next highest. *State v. Cameron* (1923) 179 Wis. 405, 192 N. W. 374. And it has even been held that "bad faith" is immaterial so long as the candidate himself is not involved in the "fraud." See *Gardner v. Burke* (1901) 61 Neb. 534, 85 N. W. 541. Contrary to these views, there seems to be a growing tendency to regard votes for an ineligible candidate as "protest votes." *State v. Walsh* (1879) 7 Mo. App. 142 (death of candidate receiving highest number of votes known; new election necessary); *Woll v. Jensen* (1917) 36 N. D. 250, 162 N. W. 403; see *Sanders v. Rice* (1918) 41 R. I. 127, 102 Atl. 914. But, in the instant case, even in the absence of evidence of protest against the minority candidate, the fact that the supporters of the latter gave notice to the voters of the ineligible candidate's disqualification should not raise a presumption that the votes were cast "in wilful defiance of the law." *Sanders v. Rice, supra.* A plausible inference is that the votes were so cast out of respect for the memory of the deceased candidate, thus necessitating a new election.

GARNISHMENT—ISSUE OF WAREHOUSE RECEIPTS ON GARNISHED GOODS.—Plaintiff got a writ of garnishment against a defaulting seller. The sheriff, finding in defendant's warehouses 200 bales of linters of the seller who held negotiable warehouse receipts therefor, garnished these bales and left a copy of the writ. Defendant had also 123 more bales of the seller's left by a railroad with bills of lading still outstanding. These bills being subsequently received, the railroad released the 123 bales to defendant who delivered negotiable warehouse receipts therefor to the seller. The lower court quashed the attachment as to all 323 bales and plaintiff appealed. *Held,* that the judgment be affirmed as to the 200 bales and reversed as to the 123 bales. *International Bedding Co. v. Terminal Warehouse Co.* (1924, Md.) 126 Atl. 902.

Before the uniform state laws one could garnish goods with negotiable warehouse receipts outstanding, the garnishee being responsible if he delivered the goods even to a subsequent purchaser of the receipts for value. *Smith v. Picket* (1849) 7 Ga. 104; but *cf. Roudebush v. Hollis* (1898) 21 Pa. Co. Ct. 324. Under these acts to garnish goods for which a negotiable document of title is out-

standing one must first impound the document or enjoin its negotiation. Sales Act, sec. 39; Bills of Lading Act, sec. 24; Warehouse Receipts Act, sec. 25; 2 Williston, *Sales* (2d ed. 1924) sec. 438, 439. And if the garnishee delivers the goods to the garnishor with document outstanding he is responsible to an innocent purchaser. *Love v. Compress Co.* (1924, Miss.) 102 So. 275. That the acts do not apply to replevin, see (1924) 24 COL. L. REV. 931. Accordingly in the instant case there was no valid garnishment of the 200 bales. There has been some confusion as to the proceedings necessary to effective garnishment. Apparently attachment of the document itself is ineffective. *Pottash v. Oil Co.* (1922) 274 Pa. 384, 118 Atl. 317; NOTES and COMMENT (1923) 8 CORN. L. QUART. 176. And no effective injunction can issue in a state having jurisdiction over neither the document nor the holder. *Brimberg v. Bag Co.* (1918) 89 N. J. Eq. 425, 105 Atl. 68. But the instant case is peculiar as to the 123 bales. In most states a garnishee is responsible only as to the goods of the principal debtor in his hands at the time of garnishment. *Falk v. Exp. Co.* (1922) 79 Pa. Super. Ct. 99; Drake, *Attachment* (7th ed. 1891) sec. 451a, 667. But in Maryland he is responsible also as to goods subsequently coming into his possession. Ann. Code, 1911, art. 9, sec. 10; *Farley v. Colver* (1910) 113 Md. 379, 77 Atl. 589. It was therefore held that the writ left with defendant acted upon the 123 bales as soon as the railroad released them to the garnishee. A garnishee who delivers the *res* to the principal debtor or to a third party is personally responsible to the garnishor. *Alexander v. Trust Co.* (1921) 206 Ala. 50, 89 So. 66; (1909) 7 MICH. L. REV. 421. Plaintiff therefore properly recovered in the instant case. A garnishor may sue for conversion one who gets the *res* with notice. *Focke v. Blum* (1891) 82 Tex. 436, 17 S. W. 770. But not an innocent purchaser. *McGarry v. Coal Co.* (1887) 93 Mo. 237, 6 S. W. 81. He may enjoin surrender of the *res* by the garnishee only if the latter is insolvent. *Sweet v. Oliver* (1881) 56 Iowa, 744, 10 N. W. 275; *contra: Bigelow v. Andress* (1863) 31 Ill. 322 (not even then). It has been said that the garnishor has a specific lien. *Allen v. Hall* (1842) 46 Mass. 263; Rood, *Has the Garnishing Creditor a Specific Lien?* (1900) 51 CENT. L. JOUR. 25. An equitable lien. *Reed v. Fletcher* (1888) 24 Neb. 435, 39 N. W. 437. An inchoate lien. *Dishman v. Griffis* (1917) 198 Ala. 664, 73 So. 966. Only a personal right against the garnishee. *Sargent v. State* (1921) 47 N. D. 561, 182 N. W. 270; Drake, *op. cit.* sec. 453. The instant case suggests the problem, what on the same facts would have been the garnishor's remedy if the garnishee had become insolvent. In specific lien jurisdictions it would seem that the garnishee had no goods of the principal debtor for which he could issue a valid document of title. The receipts would therefore be absolutely void and the rights of even an innocent purchaser would be subject to the lien. *Cf. Soltau v. Gerdau* (1890) 119 N. Y. 380, 23 N. E. 864 (warehouse receipts issued to a thief). Where the garnishor is held to have a mere personal right, the contrary is of course true. The former seems the view likely to be taken under the uniform state laws. Impounding of outstanding documents of title would be ineffective if a garnishee by issuing similar documents could convey title to an innocent purchaser.

INSURANCE—DEVIATION BY VESSEL—WHEN EXCUSED.—During the late war, a vessel insured for a voyage "at and from New York to Gothenberg, and return," was intercepted by a British warship on the return trip, taken to an English port for search, and held there a number of months. As a result the vessel's supply of coal was almost exhausted, but although the search had revealed no contraband, sufficient coal to complete the voyage was refused unless the vessel would first proceed to Sweden for a cargo. While returning from Sweden to England with the cargo, the vessel was torpedoed. The trial court decided that this was not such an unnecessary deviation as would relieve the insurers from responsi-

bility. *Held,* that the decision be affirmed. *Aktiebolaget Malareprovinsernas Bank v. Hanover Fire Ins. Co.* (1925, Sup. Ct.) 208 N. Y. Supp. 173.

Any "voluntary" departure from the contract of insurance by the assured, even though the risk be lessened thereby and the ship regain her route before any loss occurs, is a deviation discharging the underwriters. *King v. Delaware Insurance Co.* (1808, U. S.) 6 Cranch, 71; *Kettel v. Wiggin* (1816) 13 Mass. 68; (1906) 6 Edw. 7, c. 41, sec. 46. Any delay in port for the prosecution of other business, or any unreasonable delay in prosecuting the business of the voyage is a deviation. *African Merchants v. British Insurance Co.* (1873) L. R. 8 Exch. 154. Or, a departure to avoid a peril not insured against. *O'Reilly v. Royal Exchange Assurance Co.* (1815, N. P.) 4 Campb. 246. A departure is excused where mutiny of the crew, peril of the sea, danger of capture, want of repairs, disability of the crew, or unseaworthiness of the vessel permits the master no alternative and he is forced to leave his route. See *Burgess v. Equitable Marine Insurance Co.* (1878) 126 Mass. 70. Stoppage to save human life is excused, but not to save property. See *The Henry Ewbank* (1833, C. C. D. Mass.) 1 Sumn. 400. The discharge of the insurer depends not upon increase of risk, but wholly on departure of the insured from the contract of insurance. *Maryland Insurance Co. v. LeRoy* (1812, U. S.) 7 Cranch, 28. The reason for the construction of marine insurance policies in favor of the insurer seems historical, for before modern methods of communication the insurer was almost completely dependent on the insured for information. As a result decisions are often harsh, but the instant case seems within the rule excusing departures compelled by some external force beyond the master's control.

INSURANCE—EXCEPTED RISKS—REQUIREMENT OF CAUSAL CONNECTION BETWEEN RISK AND ACCIDENT.—The plaintiff was insured against accidents to his automobile under a policy excepting the defendant company from responsibility "while" the automobile was "being driven by any person in violation of the law as to age, or if there be no age limit, under the age of sixteen years." In Mississippi there is no such age limit. The plaintiff's car met with an accident while being driven by a boy under sixteen. There was, however, no direct causal connection between the fact of the car being so driven and the accident. The lower court found for the plaintiff and the defendant appealed. *Held,* that the judgment be reversed. *Hossley v. Union Indemnity Co. of New York* (1925, Miss.) 102 So. 561.

A clause in an insurance policy excepting responsibility while a certain state of facts continues has been construed to require a causal relation between the excepted risk and the loss. Thus when injury received in voluntary exposure to danger is excepted, there must be a causal connection between the exposure and the injury. *Ætna Life Insurance Co. v. Hicks* (1900) 23 Tex. Civ. App. 74, 56 S. W. 87. Similarly, when the exception is of injuries received in violation of law, "in violation" is construed as meaning "in consequence of violation." *Jones v. United States Mutual Accident Association* (1894) 92 Iowa, 652, 61 N. W. 485; see *Bloom v. Franklin Life Insurance Co.* (1884) 97 Ind. 478; Vance, *Insurance* (1904) 526. But when the exception is intoxication, there need be no causal connection. *Shader v. Railway Passengers' Assurance Co.* (1875, N. Y. Sup. Ct. 4th Dept.) 3 Hun, 424, affd. (1876) 66 N. Y. 441; *Standard Life & Accident Insurance Co. v. Jones* (1892) 94 Ala. 434, 10 So. 530; see *Mabee v. Continental Casualty Co.* (1923) 37 Idaho, 667, 219 Pac. 598; Vance, *op. cit.* 585. So in case the exception is of injuries received in violation of a child labor law. *Goodwillie v. London Guarantee & Accident Co.* (1900) 108 Wis. 207, 84 N. W. 164 (a child employed under statutory age); *Tozer v. Ocean & Accident & Guarantee Corp.* (1905) 94 Minn. 478, 103 N. W. 509; *cf. Kilby Car & Foundry Co. v. Georgia Casualty Co.* (1923) 209 Ala. 356, 96 So. 319. Similarly, when the exception, as

in the instant case, is of injuries received while a passenger conveyance is operated by a boy under the statutory age, or, in absence of statute, under eighteen. *Fidelity & Casualty Co. of New York v. Palmer Hotel Co.* (1918) 179 Ky. 518, 200 S. W. 923 (accident in elevator due to faulty construction). Where the excepted mode of conduct is of a general nature, a variety of circumstances may fall within the literal provisions of the policy. Here it seems more within the contemplation of the parties to limit the exception to cases where there is a causal connection. But the mode of conduct excepted in the instant case is of a particular nature. The construction of the clause should therefore be to suspend the operation of the policy during periods of time in which the automobile is being driven by a person under sixteen, and causation seems irrelevant to the issue.

INTERNATIONAL LAW—EXTRADITION—CONVICTION FOR OFFENSE NOT COVERED BY TREATY.—The relator was extradited from England on a charge of grand larceny and a violation of the Penal Code. Only the former was an extraditable crime under the treaty. He was acquitted of the larceny charge, but convicted for violation of the Penal Code. He sued out a writ of habeas corpus. *Held*, that the writ be dismissed. *People ex rel. Stilwell v. Hanley* (1924, Sup. Ct. Spec. T.) 207 N. Y. Supp. 176.

Under the territorial theory of crime, a fugitive criminal will ordinarily escape punishment unless he is brought back to the country where the crime was committed. 4 Moore, *Digest of International Law* (1906) 287. The court will not inquire into the method used to effect his return, since the social necessity of punishment is deemed to outweigh the undesirability of force or fraud. *Ker v. Illinois* (1886) 119 U. S. 436, 7 Sup. Ct. 225; *United States v. Unverzagt* (1924, W. D. Wash.) 299 Fed. 1015; *contra: In re Robinson* (1890) 29 Neb. 135, 45 N. W. 267; *cf. Bell v. Lawrence* (1913, City Ct. Spec. T.) 140 N. Y. Supp. 1106 (service of civil process by trick set aside). There is no duty imposed by international law to surrender fugitives on demand, and municipal law or policy may forbid a surrender in the absence of treaty. Act of Aug. 12, 1848, sec. 5 (9 Stat. at L. 303); *cf. Ex parte McCabe* (1891, W. D. Tex.) 46 Fed. 363; *Tucker v. Alexandroff* (1902) 183 U. S. 424, 22 Sup. Ct. 195. Therefore when a demand is made under a treaty, the surrendering country must be assured that the treaty is not being used as a cloak under which to punish for an unextraditable offense. *cf. Smith v. Canal Zone* (1918, C. C. A. 5th) 249 Fed. 273; (1922) 35 HARV. L. REV. 618. And the punishment must be limited to the crime for which the fugitive was extradited. *United States v. Rauscher* (1886) 119 U. S. 407, 7 Sup. Ct. 234; *Johnson v. Browne* (1907) 205 U. S. 309, 27 Sup. Ct. 539; Treaty of 1889, art. 3 (26 Stat. at L. 1509) "No person . . . . shall be . . . . tried for any crime . . . . other than the offense for which he was surrendered . . . ."; (1870) 33 and 34 Vict. ch. 52, sec. 19; see (1922) 31 YALE LAW JOURNAL, 443; *cf. Collins v. O'Neil* (1909) 214 U. S. 113, 29 Sup. Ct. 573 (punishable for a crime committed after extradition). Compare interstate rendition where there is a duty to surrender (U. S. Const. Art. 4, sec. 2) and hence no such limitation. *Lascelles v. Georgia* (1893) 148 U. S. 537, 13 Sup. Ct. 687; (1922) 6 MINN. L. REV. 595. And the accused may oppose a violation thereof. 4 Moore, *op. cit.* 321; see NOTE AND COMMENT (1922) 20 MICH. L. REV. 536. When the demand for extradition includes an unextraditable offense, it has been assumed that the demanding country will not allow a trial for any but the extraditable offense. *Kelly v. Griffin* (1915) 241 U. S. 6, 36 Sup. Ct. 487 (extradition from U. S.); *Bingham v. Bradley* (1915) 241 U. S. 511, 36 Sup. Ct. 634 (same). Or that the surrendering country voluntarily assented to the demand irrespective of treaty. *Ex parte Foss* (1894) 102 Calif. 347, 36 Pac. 669 (extradition into U. S.); see *Greene v. United States* (1907, C. C. A. 5th) 154 Fed. 401 (same). The accused cannot oppose punish-

ment unless the first assumption is made. The instant case makes the second assumption and thereby reads a modification into the treaty when we are the demanding country, which we would have to protest were we the surrendering country. See Act of Aug. 12, 1848, *supra*.

REAL PROPERTY—EASEMENTS—PRESCRIPTION AGAINST MUNICIPALITY.—In 1870 the plaintiff's predecessor in title built a stairway from the street to his basement floor, encroaching upon the sidewalk. This had been continuously used until the defendant city ordered its removal. The plaintiff sued to restrain enforcement of this order. From an adverse decree the plaintiff appealed. *Held,* that the decree be reversed. *Engleman v. City of Kalamazoo* (1925, Mich.) 201 N. W. 880.

Interests in land belonging to the federal or state government cannot be acquired by adverse possession or user. *Oaksmiths' Lessees v. Johnston* (1875) 92 U. S. 343; *Hemphill v. Moy* (1917) 31 Idaho, 66, 169 Pac. 288; *Perry v. Eames* (1891) 1 Ch. 658 (prescription). The rule rests on the theory that the rights of the people should not be prejudiced by the negligence of public officials who have not the incentive of private owners to guard these rights. *United States v. Hoar* (1821, C. C. Mass.) 2 Mason, 311. Some courts have held that this rule should not be applied to a municipality since it is a more compact body and encroachments upon its rights are more likely to be noticed. *Ft. Smith v. McKibbin* (1883) 41 Ark. 45; *Meyer v. Lincoln* (1891) 33 Neb. 566, 50 N. W. 763. But the increasing weight of authority applies the same rule to municipalities. *Donovan v. Union Pac. Ry.* (1920) 103 Neb. 663, 177 N. W. 159; *Board of Com'rs of Douglas County v. City of Lawrence* (1918) 102 Kan. 656, 171 Pac. 610; *Foote v. Town of Watonga* (1913) 37 Okla. 43, 130 Pac. 597. Prior to 1907 the minority rule had been firmly established in Michigan. *Flynn v. City of Detroit* (1892) 93 Mich. 590, 53 N. W. 815; *Vier v. City of Detroit* (1897) 111 Mich. 646, 70 N. W. 139; *Schneider v. City of Detroit* (1904) 135 Mich. 570, 98 N. W. 258. But in 1907 Michigan was brought into line with the majority rule by statute. Mich. Pub. Acts, 1907, no. 64. In the instant case the easement had already been perfected in 1907 by 37 years of adverse user. The statute therefore did not apply.

SALES—FAILURE TO NOTIFY SELLER OF BREACH OF WARRANTY WITHIN A REASONABLE TIME.—After completion of a contract for the sale of cotton pickings warranted equal to sample, the buyer's agent inspected and approved the bales and the buyer paid and resold. Five months later the final purchaser rejected them because of false packing which a proper inspection at any time would have revealed. On the ground that the seller's warranty survived both inspection and acceptance, the trial court awarded the buyer damages and the seller appealed. *Held,* that the judgment be reversed. *American Waste Co., Inc. v. St. Mary* (1924, 1st Dept.) 210 App. Div. 383, 206 N. Y. Supp. 316.

It is questionable whether inspection by the buyer waives an express warranty. *Crescent Cotton Oil Co. v. Union Gin & Lumber Co.* (1917) 138 Tenn. 58, 195 S. W. 770; 1 Williston, *Sales* (2d ed. 1924) 402. Especially where the inspection occurs after the contracting. *Hitz v. Warner* (1911) 47 Ind. App. 612, 93 N. E. 1005. But the decision may be supported on the basis that the buyers' failure to give notice within a reasonable time after he ought to have known of the breach of warranty relieves the seller of responsibility therefor. Uniform Sales Act, sec. 49. No mention was made of the Sales Act in the instant case.

SPECIFIC PERFORMANCE—SUIT BY VENDEE WHO HAS SOLD TO A THIRD PARTY.—The plaintiff agreed to build a party wall in consideration for the defendant's promise to convey to him a five-foot strip of land. The plaintiff built the wall, but the defendant did not convey the strip. The plaintiff sold the strip

with covenants of warranty, and then sued for specific performance. The defendant demurred on the ground that the subvendee was the only one who could bring the suit or was at least a necessary party. The demurrer was overruled. *Held,* that the ruling be affirmed. *Blair v. Morris* (1924, Ala.) 101 So. 745.

When the vendee in an executory contract for the sale of land contracts to resell, he retains his interest in the original contract, and further assumes a duty to deliver good title to the subvendee. *Bittrick v. Consolidated Improvement Co.* (1909) 51 Wash. 469, 99 Pac. 303; see *Mier Co. v. Hadden* (1907) 148 Mich. 488, 111 N. W. 1040; NOTES (1921) 21 COL. L. REV. 80. *cf. Hazelton v. Miller* (1905) 25 App. D. C. 337; *Schmid v. Whitten* (1920) 114 S. C. 245, 103 S. E. 553 (remedy at law deemed adequate). But when he attempts to resell and convey the land, he thereby effects an assignment of all his interest and therefore cannot bring an action to enforce the original contract of sale. *Brewer v. Dodge* (1873) 28 Mich. 359; *cf. Taylor v. Hurst* (1919) 186 Ky. 71, 216 S. W. 95. However, when the attempted sale is with covenants of warranty, the vendee's obligations under the warranty deed would seem to make him an interested party, as in the contract of sale. *Cf. Manning v. Marchman* (1920) 150 Ga. 309, 103 S. E. 795. And since by the doctrine of equitable estoppel, title acquired by the vendee will be immediately transferred to the subvendee, it seems sound not to require the subvendee to be joined as a necessary party to the action.

TAXATION—VALIDITY OF SUCCESSION TAX ON FOREIGN LAND EQUITABLY CONVERTED.—Testatrix, domiciled in South Carolina, directed in her will that her real estate in Pennsylvania be sold to carry out certain legacies. The South Carolina Tax Commission included the value of that real estate in assessing the transfer tax, on the theory that the absolute direction in the will effected such a conversion of the real estate into personalty as to permit the state of the domicile to tax its transfer. From this ruling, the executors and legatee appealed. *Held,* that the ruling be affirmed. *Land Title & Trust Co. v. South Carolina Tax Commission* (1925, S. C.) 126 S. E. 189.

The state of the domicile of a decedent has jurisdiction to impose a tax on the succession to rights relating to movables wherever they are situated. *Frothingham v. Shaw* (1899) 175 Mass. 59, 55 N. E. 623; *State ex rel. Smith v. Probate Court of Ramsey County* (1914) 124 Minn. 508, 145 N. W. 390. The succession to rights relating to immovables may be validly taxed only by the state of their physical location. *In re Swift* (1893) 137 N. Y. 77, 32 N. E. 1096; *Allen v. National State Bank* (1901) 92 Md. 509, 48 Atl. 78. In the instant case the law of the physical location of the immovables recognizes the doctrine of "equitable conversion" by direction in the will to sell the land, and declares the rights in the immovables to be "personal property." *In re Dull's Estate* (1908) 222 Pa. 208, 71 Atl. 9. This may be construed as sufficient acquiescence by the state of the physical location of the land to justify the state of the domicile in taxing the succession to these rights as to other personal property. (1915) 29 HARV. L. REV. 343; (1920) 5 IOWA L. BUL. 278. Pennsylvania and Iowa alone apply the doctrine of "equitable conversion" by the law of the domicile in construing the will, without regard to the law of the physical location of the land. Then having said the rights are "personal property," they tax the succession to them as such. *Dalrymple's Estate* (1906) 215 Pa. 367, 64 Atl. 554; *In re Sanford's Estate* (1919) 188 Iowa, 833, 175 N. W. 506; Ross, *Inheritance Taxation* (1912) sec. 55. This seems supportable on no theory. Jurisdiction to impose a succession tax is based on the service of the state in transferring the rights, and the state of the physical location of immovables does this. *Clarke v. Clarke* (1900) 178 U. S. 186, 20 Sup. Ct. 873; *Connell v. Crosby* (1904) 210 Ill. 380, 71 N. E. 350; *McCurdy v. McCurdy* (1908) 197 Mass. 248, 83 N. E. 881; (1920) 29 YALE LAW JOURNAL, 808.

TRUSTS—CONSTRUCTIVE TRUSTS—CONFIDENTIAL RELATIONSHIP BETWEEN BANKER AND CUSTOMER—PURCHASE OF PROPERTY BY BANKER FOR WHICH CUSTOMER WAS NEGOTIATING.—The plaintiff, a customer of the defendant's bank, and the defendant were negotiating for the purchase of the same property, unknown to each other. In asking the defendant for a loan, the plaintiff declared that it had bought the property. The defendant, discovering that the property had not been sold, put in a still higher offer than its previous one and got it. The plaintiff seeks to impress a constructive trust upon the property acquired by the defendant. *Held,* that judgment be for the defendant. *Stewart & Co. v. Marcus and Others* (1924, Sup. Ct. Spec. T.) 124 Misc. 86, 207 N. Y. Supp. 685.

A fiduciary who acquires property in violation of his duty will be regarded as a constructive trustee. *Rolikatis v. Lovett* (1913) 213 Mass. 545, 100 N. E. 748 (attorney); *Rogers v. Genung* (1909) 76 N. J. Eq. 306, 74 Atl. 473 (broker); *Mitchell v. Reed* (1874) 61 N. Y. 123 (partner); see (1924) 33 YALE LAW JOURNAL, 885. Or, if the property be resold, he will be responsible to the beneficiary for an accounting. *Wakeman v. Dodd* (1876) 27 N. J. Eq. 564. Business practice justifies the recognition of a confidential relationship between banker and customer. *Tournier v. Nat'l Provincial and Union Bank of England* [1924, C. A.] 1 K. B. 461; see COMMENTS (1924) 33 YALE LAW JOURNAL, 859. In the instant case, however, the untruth of the plaintiff's statement and the fact that the defendant was at the time negotiating for the property clearly show that no confidence was intended.

WAREHOUSE RECEIPTS—PERSONS QUALIFIED TO ISSUE UNDER THE UNIFORM ACT.—The plaintiff, a chattel mortgagee of two automobiles to secure a debt of the Conway Storage Co. and one Stary, its president, sued the defendant for the conversion of the cars. The defendant set up that it had a superior lien derived from warehouse receipts for the cars, issued by the storage company as security for debts, the receipts having been issued before the mortgage was executed and the cars subsequently delivered on surrender of the receipts. Stary, operating a garage business, had formed the storage company and obtained a license to operate a public storage business. But the company had no warehouse other than the garage nor did it appear to receive any goods other than those handled by Stary in his garage business. The plaintiff had, however, previously held as security the company's warehouse receipts covering goods of this kind. The trial court found that Stary was the owner in possession of the cars when the mortgage was executed and rendered a judgment for the plaintiff from which the defendant appealed. *Held,* (one judge *dissenting*) that the judgment be reversed. *Michigan City Bank v. First Bank of Manvel* (1924, N. D.) 201 N. W. 176.

Recording statutes are good evidence that secret liens and pledges are generally looked upon with disfavor by legislators. See also sec. 55, Uniform Warehouse Receipts Act. Free passage of property in goods without necessity of their physical transfer tends to increase the volume of business which can be transacted. Mohun, *The Effect of the Uniform Warehouse Receipts Act* (1913) 13 COL. L. REV. 202, 212. But since free transfer of goods in storage is not reconcilable with free transfer of documents representing them, the documents can be properly substituted only when there is adequate notice that the possessor of the goods is a warehouseman. Accordingly, only one lawfully engaged in the business of storing goods for profit is qualified to issue valid warehouse receipts, probably on the theory that one so engaged will so advertise and transact his business that the public will have a knowledge of its nature sufficient to put it on guard against outstanding receipts. Uniform Act, *supra,* secs. 1, 58. Thus a mere casual bailee is not so qualified. *Alton v. New York Taxicab Co.* (1910, Sup. Ct. App. T.) 66 Misc. 191, 121 N. Y. Supp. 271. Nor

is one storing merely his own goods. *Moore v. Thomas Moore Distilling Co.* (1915) 247 Pa. 312, 93 Atl. 347; *Citizens' Bank v. Willing* (1920) 109 Wash. 464, 186 Pac. 1072. But profit need not be derived from direct payment. *Citizens' Bank of Vici v. Gettig* (1919) 77 Okla. 48, 187 Pac. 217 (warehouseman expected to purchase goods). Change in possession, and control of the goods of course, is an important fact in these transactions. *Moore v. Jagode* (1900) 195 Pa. 163, 45 Atl. 723; *Love v. Export Storage Co.* (1906, C. C. A. 6th) 143 Fed. 1; *Laube v. Seattle Nat. Bank* (1924) 130 Wash. 550, 228 Pac. 594. Setting apart the goods and tagging them is evidence of such change. *American Can Co. v. Erie Preserving Co.* (1910, C. C. A. 2d) 183 Fed. 96; *Peoples Bank of Buffalo v. The Aetna Indemnity Co.* (1916) 91 Conn. 57, 98 Atl. 353. So also a warehousing sign on the building. *Love v. Export Storage Co. supra; Union Trust Co. v. Wilson* (1905) 198 U. S. 530, 25 Sup. Ct. 766. But when there is no such evidence of change in control that creditors and third parties may receive notice therefrom, the transaction constitutes neither a sale, mortgage, nor pledge, but is a mere contract to deliver. *Nat'l. Bank of Kansas City v. Flanagan Mills Co.* (1916) 268 Mo. 547, 188 S. W. 117. And courts have shown a tendency to look through a sham covering of such transactions to their real nature. *Security Warehousing Co. v. Hand* (1907) 206 U. S. 415, 27 Sup. Ct. 720; *Citizens' Bank v. Willing, supra.* The court, in the instant case, divided as to the fact of notice. The decision and dissent both seem sound when considered along with their findings on the facts.

WILLS—ADOPTED CHILD NOT INCLUDED IN DEVISE TO CHILDREN OF TESTATOR'S SON.—Testator left real estate to his son for life and at his death one-half interest to his children, if any, or if he died childless to the appellant. The son died childless unless the appellee, adopted 14 years after the testator's death, be considered a "child." The circuit court held that the appellee was a "child" of the testator's son and entitled to the one-half interest. *Held,* that the judgment be reversed. *Caspar v. Helvie* (1925, Ind.) 146 N. E. 123.

Where the intention to include adopted persons in a devise to "children" is not clear, the time of adoption and the identity of the testator must be considered as evidencing his intention. *Munie v. Gruenewald* (1919) 289 Ill. 468, 124 N. E. 605 (adoption before execution of will evidenced intention to include adopted child); *Sewall v. Roberts* (1874) 115 Mass. 262 (adopted child held to have been intended, adoptive parent being testator); see Pa. Sts. 1920, par. 8327; Kales, *Estates and Future Interests* (1920) 675. In some states the adoption statutes are so limited as to give the person adopted the rights of an heir only and not of a child by birth. Tex. Rev. Civ. Sts. 1920, art. 2. The more liberal statutes give the adopted person the same rights as if born to the adoptive parents in lawful wedlock. Hurd's Ill. Rev. Sts. 1919, ch. 4, sec. 5. The courts seem to reject this distinction as a determining factor and to hold that under either statute the adopted person may not take under a devise to "children" unless he can show that the term was meant to include those who attained that status by adoption as well as by birth. *Middletown v. Gaffey* (1921) 96 Conn. 61, 112 Atl. 689; *In re Puterbaugh's Estate* (1918) 261 Pa. 235, 104 Atl. 601; *contra:* Kales, *op. cit.* 676. In the instant case the adoption took place after the death of the testator, and the testator was not the adoptive parent. The case thus seems to follow the general trend.